PP

v.

JESICCA LIM LU PING & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN NAIR JC
[CRIMINAL TRIAL NO: MT(1) 45-20-2003]
6 MAY 2004

CRIMINAL PROCEDURE: *Sentence - Plea of guilty - Plea of guilty as mitigating factor - Principles and application - Discount - Whether and how much discount to give - Element of public interest in encouraging accused to plead guilty - Remand-prisoners and backlog of undisposed criminal cases - Whether sentence adequate in punishing, deterring and rehabilitating accused*

CRIMINAL PROCEDURE: *Sentence - Mitigation - Mitigating factors - Previous good character - Relative offensiveness of dangerous drug in possession - Not fleeing when there was opportunity - Honesty in exonerating others of any involvement with dangerous drug - Suffering endured from date of arrest to date of sentencing - Demands of public interest - Deterrent sentence - Concept of punishment - Rehabilitation*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 12(2) - Section 39A(2) - Possession, custody or control of dangerous drugs - Plea of guilty - Sentence to be imposed - Imprisonment and whipping - Six years' imprisonment and ten strokes of whipping - Adequacy of sentence*

Both the 1st and 2nd accused were initially charged with trafficking in a dangerous drug (101.48g of Methamphetamine) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the hearing, however, the prosecution tendered an alternative charge for 'possession, custody or control' under s. 12(2) DDA read together with s. 39A(2) thereof. The 1st accused claimed trial to both the charges but the 2nd accused pleaded guilty to the alternative charge and was, accordingly, convicted. The prosecution then withdrew both the charges against the 1st accused. The principal issue before the learned judge was how much discount, if any, should the 2nd accused be given on his sentence on account of his guilty plea and his plea in mitigation.

Held:

[1] No golden rule has yet been formulated by the courts in respect of sentencing in criminal cases. There is, however, a general flexible principle that the trial court is free to exercise its discretion, judicially and conscientiously, with regard to the period of incarceration that a convict should undergo. It is customary for the court to give the convict a reduced-sentence for pleading guilty. The court recognises that a plea of guilty disposes of a criminal case with lightning speed; it eases the backlog of undisposed criminal cases and unclogs the courts and prisons of remand-prisoners. A reduced-sentence for pleading guilty encourages the accused to be honest in admitting to the offence he has committed. A discount of between one-quarter and one-third of the sentence that would otherwise have been imposed is usually given. (pp 767 g-h & 768 a-e)

[2] Each plea in mitigation should be considered earnestly and not ritualistically. In sentencing the 2nd accused, the other mitigating factors that could be considered in his favour were: (i) his previous good character; (ii) that Methamphetamine is not as obnoxious or deleterious as heroin, morphine, monoacetylmorphines, cocaine or cannabis; and (iii) that although the 2nd accused was a distance away from the house (in which the dangerous drug was kept) when the police raided it, he did not attempt to flee but had demonstrated a measure of civic consciousness and honesty by going into the raided house and exonerating the other occupants, including the 1st accused, of any involvement with the dangerous drug. Thereafter, the 2nd accused had promptly given a cautioned statement admitting full responsibility for the dangerous drug seized from the house. (pp 768 f-h, 769 a-h & 770 a)

[3] It would be in the public interest to show a modicum of leniency to the 2nd accused who had readily co-operated with the police, the public prosecutor and the court. In the circumstances, a sentence of six years' imprisonment and ten strokes of whipping would be sufficient to meet the demands of public interest in punishing, deterring and rehabilitating 2nd accused. The era of punishing 'tooth for a tooth' and 'eye for an eye' is a dark chapter in the history of corporal punishment. (p 770 b-h)

[4] The 2nd accused had endured crushing emotional punishment from the date of his arrest on 5 June 2002 to the date of sentencing on 26 February 2004 – with the hangman's noose dangling above his head. That was a strong deterrent in itself and was a factor to be considered in sentencing 2nd accused. (pp 769 f & 771 a-b)

[5] If the 2nd accused had claimed trial and was, thereafter, convicted, he might have been sentenced to about nine years' imprisonment and twelve strokes of whipping. Considering his guilty plea and plea in mitigation, the 2nd accused could be given a discount of about one-third of the sentence that might have been imposed. Hence, the 2nd accused should be sentenced to six years' imprisonment and ten strokes of whipping. (p 771 g)

Case(s) referred to:
Chan Sit Hoong v. PP [1975] 1 MLJ 261 ***(refd)***
Jonaidi Mansor v. PP [2002] 1 CLJ 730 CA ***(refd)***
Melvani v. PP [19871] 1 MLJ 137 ***(refd)***
Mohamad Abdullah Ang Swee Keng v. PP [1988] 1 MLJ 167 ***(foll)***
Mogan Maruthamuthu v. PP [2003] 5 CLJ 118 HC ***(refd)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(refd)***
PP v. Mohd Nooh Yusof & Ors [1993] 4 CLJ 275 HC ***(refd)***
PP v. Puvaneaswaran [2003] 4 CLJ 609 HC ***(refd)***
Reg v. Curran [1973] 57 Cr App R 945 ***(foll)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)(a)

For the prosecution - Mohd Azari Harun DPP
For the accused - G Subramaniam Nair; M/s Maniam Nair & Co

Reported by Gan Peng Chiang

JUDGMENT

KP Gengadharan Nair JC:

The Charges & Facts

The two accused were initially charged for trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) of the dangerous drug, Methamphetamine. When the matter came up for hearing an alternative charge for possession, custody or control of the aforesaid drug under s. 12(2) of the Act read together with s. 39A(2) of the Act was tendered by the learned deputy public prosecutor. The charge and the alternative charge read as follows:

PERTUDUHAN

Bahawa kamu bersama-sama pada 5 Jun 2002, lebih kurang jam 8.30 malam di rumah No. 27, Jalan Landak Maman, Taman Century, dalam daerah Johor Bahru dalam Negeri Johor Darul Ta'zim, telah mengedar dadah berbahaya iaitu 101.48 gram Methamphetamine, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama dengan seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

PERTUDUHAN PILIHAN

Bahawa kamu bersama-sama pada 5 Jun 2002, lebih kurang jam 8.30 malam di rumah No. 27, Jalan Landak Maman, Taman Century, dalam daerah Johor Bahru dalan Negeri Johor Darul Ta'zim, bukan sebagai seorang yang diberi kuasa atau disifatkan sebagai seorang yang telah diberikan kuasa, telah didapati dalam milikan kamu dadah berbahaya jenis Methamphetamine seberat 101.48 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

When both the charge and the alternative charge were read and explained to both accused the first accused, a woman, claimed trial to both the charge and the alternative charge.

The second accused, Yap Ser Yong (hereinafter referred to as "the accused"), pleaded guilty to the alternative charge. The court ascertained that the accused understood the nature and the consequences of the plea of guilt. The facts of the case as tendered by the prosecution were read and explained to the accused who admitted the same without any reservation. The exhibits including the report of the chemist were then tendered and the accused acknowledged the same without question whereupon I accepted his plea of guilt to the alternative charge and convicted him in this regard. After hearing the mitigation plea on his behalf and the reply by the prosecution I sentenced the accused to a term of imprisonment of six years w.e.f the date of his arrest (5 June 2002) and further ordered that he be given ten strokes of the rotan.

The learned deputy public prosecutor thereupon withdrew the charge and the alternative charge against the first accused. Hence, I acquitted and discharged the first accused.

The learned Public Prosecutor has now appealed against the sentence imposed upon the accused.

The punishment provided by s. 39A(2) of the Act for the offence for which the accused was convicted is imprisonment for life or for a term which shall not be less than five years and whipping of not less than ten strokes.

The facts of the case as presented by the prosecution showed that on 5 June 2002 a police party raided a house in Taman Century in Johor Bahru. The accused was then outside the house together with another person who was repairing the accused's car keys. They were both then caught and brought into the house. A search of the house resulted in the seizure of some substance that appeared to be drugs and which, subsequent to analysis by the Chemistry Department, Johor Bahru, was confirmed to be the dangerous drug,

Methamphetamine, weighing 101.48 grammes. Investigations by the police showed that the house was rented by the first accused about two months prior to the raid and that both the accused and the first accused stayed in that house. Subsequent to the arrest the accused gave a cautioned statement in which he admitted that all the dangerous drugs found in the house belonged to him and that it had been given to him by a friend named "How Tee" to be made into "pil goyang kepala" which is commonly known as "ecstasy" pills. The accused also absolved the first accused of any knowledge of his activities in this regard.

Mitigation

The learned counsel for the accused in the mitigation plea submitted that the accused was 29 years old at the time of his arrest. He is married and has four children, their ages ranging from three to thirteen years. He has parents aged sixty four (father) and sixty two (mother). At the time of the arrest he was working as a foreman in a motor workshop and had no previous convictions. Learned counsel submitted further that the accused had pleaded guilty at the first opportunity given to him to do so and had as a result saved the court and the prosecution a lot of time. It was his further submission that at the time of the raid the accused was outside the house and that on seeing the police raiding his house the accused could have escaped but he chose to go into the house and took responsibility to show that about five others in the house including his mother, an Indonesian lady and the first accused had nothing to do with the drugs in the house. According to the submission the dangerous drugs found in the raid were given to the accused by a friend of his as referred to in the facts of the case presented by the prosecution. Stating that the accused wanted to show his remorse to the court for making the terrible mistake of agreeing to keep the dangerous drugs for his friend the court was urged to also consider the fact that the accused was not pleading "guilty" to a reduced charge after a trial in respect of both the type of drug and its weight. Learned counsel requested the court to impose the minimum imprisonment term of five years and to give the second an opportunity to return to his family and to look after them.

The Sentence

Despite decades of sentencing by the Malaysian courts no golden rule has yet evolved in the sentencing of accused persons following a conviction in criminal cases. Neither have the courts evolved a cast iron formula to be followed in sentencing. However, there has always been a general flexible principle that all courts have a flexible and free discretion to be exercised judicially and with a judicial conscience in deciding the period in which a guilty criminal will be incarcerated in prison.

Nonetheless, our courts have evolved a general flexible rule propounded through numerous decided cases that where an accused person pleads guilty without contesting the charge or charges against him in a trial which might consume many days, involving prosecutors, witnesses, documents, police officers and chemists the courts lean in favour of imposing a reduced sentence. A "plea of guilty" achieves the disposal of a criminal case with lightening speed. Every contest and trial leads to a backlog of undisposed criminal cases clogging the courts and the prisons with remand prisoners. It is in the public interest that pending criminal cases be disposed off as expeditiously as possible and accused persons who plead guilty be imposed with a reduced sentence. Honesty is an universal obligation and a reduced sentence encourages honesty when an accused pleads guilty, the end result being that more accused persons would willingly admit guilt without a trial, thus, reducing the workload of the prosecutor's office and the clearance of the backlog of cases.

A plea of guilt could be rewarded with a discount on the sentence which would otherwise have been imposed upon a finding of guilt after a full trial. The discount to be given could be between one-quarter and one-third following the then Supreme Court's decision in *Mohamad Abdullah Ang Swee Keng v. PP* [1988] 1 MLJ 167. In his judgment in that case Mohamad Azmi SCJ (as he then was) stated as follows:

> It is generally accepted that the extent of the reduction on account of plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.

This principle also found favour in several cases thereafter such as, for example, in *Zaidon Shariff v. PP* [1996] 4 CJ 441; *PP v. Mohd Nooh bin Yusof & 2 Ors.* [1993] 4 CLJ 275; *PP v. Ravindarn* 1 MLJ 45. In arriving at my decision on the sentence to be imposed I took into consideration the mitigating factor of the previous good character of the second accused as that was one of the factors that could be considered; (see *Melvani v. Public Prosecutor* [1971] 1 MLJ 137), that the kind of dangerous drug in this case, 101.48 grammes of Methamphetamine, was not as obnoxious or deleterious as heroin, morphine, monoacetylmorphine, cocaine or cannabis. (see *Chan Sit Hoong v. Public Prosecutor* [1975] 1 MLJ 261) and the mitigation plea on behalf of the accused by his learned counsel, Mr. Subramaniam Nair. This merited serious consideration as a mitigation plea is not just a window dressing or a mechanical robotic automatic prelude to sentencing but a necessary cog in the wheel to assist the court in arriving at a just and fair sentence in each particular case. In *Zaidon Shariff v. Public Prosecutor (supra)* Augustine Paul JC (now JCA) expressed it thus:

A mitigation plea should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in the light of the facts of each case, and more so when it is not contradicted by the prosecution as in this case. In this regard useful reference may be made to *Raja Izuddin Shah v. PP* [1979] 1 MLJ 70 where Hashim Yeop Sani J (as he then was) said at the same page:

> No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

In *Public Prosecutor v. Mohd Nooh bin Yusof & 2 Ors.* Abdul Malik b. Ishak J (then JC) referred to *Reg v. Curran* [1973] 57 Cr. App. R 945 wherein Mac Kenna J was of the view that:

> as a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence, and imposed ... For reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by consideration of individual deterrence.

In this present case the accused together with the first accused were initially charged under s. 39B(1) of the Act which carries the death penalty. Subsequently (about a year and eight months later), however, the alternative charge was added and which carries a minimum penalty of not less than five years' imprisonment and whipping of not less than ten strokes. It is pertinent to note that after the accused was convicted and sentenced the charge against the co-accused was withdrawn by the prosecution.

In my humble view, the mere fact that the hangman's noose had hung over the head of the accused was also a relevant consideration in sentencing as that by itself acts as a strong deterrent. One inflexible rule in the law relating to sentencing is that in each case the sentencing will depend on the particular facts of the case. In this present case at the material time when the police party raided the house where the dangerous drugs were found the accused was not inside the house but outside the house some distance away and had the opportunity to take to his heels or run for his life and attempt to escape arrest. The accused did nothing of this sort. The accused demonstrated civic consciousness and an attitude of co-operation with the police by walking towards and into the raided house. The accused went further and exonerated the others present in the house by informing the police that they (the others) had no connection whatsoever with the dangerous drugs found in the house. The

accused went further and in a spirit of co-operation with the police readily gave a cautioned statement in which he again admitted that the dangerous drugs recovered from the house belonged to him. That spirit of co-operation was further extended to the prosecution and the court when he pleaded guilty to the alternative charge. The accused not only demonstrated co-operation he also exhibited some honesty of character.

It is, in my humble view, in the public interest to show a modicum of leniency to accused persons who come forward and plead guilty thus not only co-operating with the law enforcement agencies like the police, the prosecution and the courts but also indirectly help the courts to reduce and unload the backlog of cases.

If a person who pleads guilty to a charge is given to harsh a sentence it will only lead to discouraging other offenders who may want to plead guilty to reconsider doing so and instead claim trial. They would be more likely to take their chances as even after a trial they may still get a similar harsh sentence. This will work against public interest. Public interest is not only to punish offenders, rehabilitate them and serve warning to others with appropriate sentences but also to ensure that cases are disposed off speedily which will not be possible if every case goes on for full trial.

In any event when the legislature enacted that the punishment for an offence under s. 39A(2) of the Act need only be a minimum of five years' and a maximum of twenty years' imprisonment with a further minimum ten strokes of the rotan, public interest must have also been considered in stipulating the minimum sentence imposable. Thus, the term of six years' imprisonment imposed upon the accused in this case is in excess of the minimum and sufficient, in my view, to meet the demands of public interest not only to ensure that the accused is punished but also to rehabilitate him in an attempt to turn him away from the error of his ways.

The imposition of ten strokes of the rotan is, by itself, a fiery, fearsome and deterrent punishment. It is my humble opinion that the sentence of six years' imprisonment and ten strokes of the rotan satisfied the element of public interest in sentencing. The philosophy of sentencing changes from one generation to another and from one century to another. The era of punishment of a "tooth for a tooth" and an "eye for an eye" is a dark chapter in the history of corporal punishment. The physical, mental and psychological effects of punishment by the strokes of the rotan, as one well knows, devastates both the mind and the body and acts as a true deterrent standing alone without any incarceration.

A further point I considered in the sentence I meted out to the accused in this case was the fact that till the day of sentencing from the date of his arrest ie, from 5 June 2002 to 26 February 2004 the accused had to endure the emotional punishment of being in a state of mind as if the hangman's noose was already around his neck except that the trap door was not sprung open yet. This mental state is enough emotional punishment to crush the mental and physical resources of any individual and destroy a person which will most likely leave a mental scar for the rest of his life. The accused was not a habitual criminal, this being his first offence, and, hopefully, his last if his rehabilitation in prison succeeds. In the circumstances, in my view, this state of emotional punishment suffered before the reduction in the gravity of the charge was also a factor to be considered in deciding upon the sentence.

I also had the guidance of cases such as *Mogan Maruthamuthu v. PP* [2003] 5 CLJ 118 wherein the accused who had two previous convictions had his sentence often years' imprisonment and ten strokes of the rotan imposed by the Sessions Court for possession of cannabis (punishable under s. 39A(2) of the Act) reduced to seven and a half years and ten strokes of the rotan on appeal to the High Court. In *PP v. Puvaneaswaran Kaniapan* [2003] 4 CLJ 609 the accused was convicted, after a trial, for possession of 60.2 grammes of heroin and monoacetylmorphines under s. 39A(2) of the Act. He was sentenced to ten years' imprisonment and ten strokes of the rotan. *PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480 was another case of possession of the dangerous drug, cannabis (9.53.2 grammes), and after a trial the accused was convicted and sentenced to ten years' imprisonment and ten strokes of the rotan. Then in *Jonaidi Mansor v. PP* [2002] 1 CLJ 730 the Court of Appeal affirmed a sentence of eight years' imprisonment and ten strokes of the rotan imposed by the Sessions Court (after a trial) for an offence under s. 6 of the Act involving 186 grammes of the dangerous drug, cannabis.

In the present case, if the matter had gone on for a full trial, I may have imposed, upon conviction, a sentence of nine years' imprisonment and about twelve strokes of the rotan. Taking into consideration the practice of granting a discount of about one-third reduction in sentence for a plea of guilt and all the other mitigating factors I imposed the sentence of six years' imprisonment and the mandatory minimum often strokes of the rotan.